

DOCKET FILE COPY ORIGINAL
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
DEC 19 1994

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)	
)	
Revision of Part 22 of the)	CC Docket No. 92-115
Commission's Rules Governing)	
the Public Mobile Services)	
)	
Amendment of Part 22 of the)	CC Docket No. 94-46
Commission's Rules to Delete)	RM 8367
Section 22.119 and Permit the)	
Concurrent Use of Transmitters)	
in Common Carrier and Non-)	
Common Carrier Service)	
)	
Amendment of Part 22 of the)	CC Docket No. 93-116
Commission's Rules Pertaining)	
to Power Limits for Paging)	
Stations Operating in the 931)	
MHz Band in the Public Land)	
Mobile Service)	

PETITION FOR RECONSIDERATION
OF
PALOUSE PAGING, INC. AND SAWTOOTH PAGING, INC.

Palouse Paging, Inc. and Sawtooth Paging, Inc. ("Petitioners"), by their attorneys and in accordance with the Commission's Rules, hereby petition the Commission to reconsider and modify the Report and Order ("R&O") in the above-captioned proceeding. Specifically, the Commission should reconsider imposing new 931 MHz application processing procedures retroactively on pending 931 MHz applications. The adoption of this new processing regime will preclude efficient assignment of new licenses, and will otherwise undermine the Commission's policy goals for a vibrant and expanding paging industry. Therefore, the Commission should reconsider and revise the R&O in accordance with

the following.

I. STATEMENT OF INTEREST

Petitioners are commonly-owned providers of high quality Radio Common Carrier ("RCC") paging services throughout the States of Idaho, Minnesota, Montana, North Dakota, Oregon, Washington and Wyoming.^{1/} Petitioners' networks utilize UHF, VHF and 931 MHz channels. Currently, Petitioners have approximately twenty-six applications for new or modified facilities pending before the Commission. Based on these interests, and on their broad experience in constructing and operating wide-area paging networks, Petitioners have a vital interest in the rules and policies imposed on RCC paging by the R&O -- especially 931 MHz paging.

II. THE COMMISSION MUST CONTINUE PROCESSING PENDING 931 MHz APPLICATIONS PURSUANT TO EXISTING RULES

Adopting concepts first introduced in a Further Notice of Proposed Rulemaking ("FNPRM"),^{2/} the R&O imposes a completely new application processing and assignment scheme for 931 MHz Public Mobile Service paging applications. In addition to applying to 931 MHz applications filed subsequent to the effective date of the rules adopted by the R&O, this new licensing scheme is equally applicable to "pending applications," which were broadly defined by

^{1/} Additionally, Sawtooth Paging, Inc. has applications pending to provide paging service in South Dakota and Nebraska.

^{2/} Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Further Notice of Proposed Rulemaking, CC Docket No. 92-115, 9 FCC Rcd 2596 (1994).

in the FNPRM to include both:

- o applications that have been filed but have yet to be acted on by the Commission; as well as
- o applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review.

Regarding the first category of applications, the R&O provides no "reasoned basis" for imposing the new processing procedure. Indeed, in this context, the new procedure is certain to wreak havoc on a generally workable status quo, which will inflict substantial prejudice on pending applications that, but for the advent of the new regime, would be granted in due course.

Subjecting the second category of applications to the new scheme is equally detrimental. Specifically, the Commission decision to transform construction authorizations that are subject to petitions for reconsideration or review into newly filed applications is ultra vires the Commission's statutory power and exceedingly unfair. Although the R&O considered "alternative policies" for these applications, this consideration was, in fact, illusory; the proposal set forth in the FNPRM is, in fact, being implemented exactly as proposed.

A. The R&O Provides No Reasoned Basis For Subjecting Routine 931 MHz Applications To New Processing Procedure

An agency undertaking to alter its regulatory course must supply a "reasoned analysis" for its decision.^{3/} A "barebones incantation" of a rationale is an inadequate basis for altering long-established policy.^{4/} And when changing a fundamental component of its regulatory framework, the Commission is duty-bound to address significant issues raised by commenting parties.^{5/} As for subjecting routine, pending 931 MHz applications that have been accepted for filing and have elicited neither petitions to deny nor mutually exclusive applications, the R&O satisfies none of these minimally sufficient requirements for reasoned decisionmaking.

Neither the FNPRM nor the R&O provide a comprehensible rationale for transforming routine, partially processed 931 MHz applications into "newly-filed" ones. According to the FNPRM:

These proceedings [i.e., major market 931 MHz applications which have been subjected to lotteries, or for which lotteries are pending] present issues we did not foresee in Paging Systems-DPLMRS and have made it difficult to process these applications in a consistent, satisfactorily [sic] manner. [Footnote omitted.] In particular, the current Part 22 rules may not provide sufficient guidance to inform applicants when 931 MHz spectrum that becomes available will be available for assignment to already pending applications.

^{3/} Action For Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987), citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983).

^{4/} Action For Children's Television, 821 F.2d at 746.

^{5/} Telecommunications Research and Action Center v. FCC, 836 F.2d 1349, 1354 (D.C. Cir. 1988).

The omitted footnote cites to Public Mobile Services Lottery, 5 FCC Rcd 7430 (Com. Car. Bur. 1990), app. for review pending, and O.R. Eastman, 5 FCC Rcd 7423 (Com. Car. Bur. 1990), both of which deal exclusively with Lottery No. PMS-31 for 931 MHz authorizations in metropolitan New York City.^{6/} The R&O offers only a single sentence for the radical change in processing it has adopted for all routinely pending 931 MHz applications:

The confusion and uncertainty surrounding the old procedures for processing these applications require a rational "fresh start" pursuant to clearly articulated rules.^{7/}

Reduced to its core, the Commission's rationale for fundamentally changing application processing rules for routine 931 MHz applications is that the New York 931 MHz lottery created unforeseeable issues making it difficult to process these applications and requiring a "'fresh start' pursuant to clearly articulated rules." Stated differently, all 931 MHz processing is being turned upside down due to a single lottery involving New York City. The Commission never provided an explanation for why conflict in a single market justifies imposing onerous new rules on thousands of routine applications involving scores of markets nationwide.

Under the current licensing procedures the Commission has

^{6/} The omitted footnote also cites to Valley Communications, 5 FCC Rcd 5274 (Mob. Serv. Div. 1990). This reference pertains to a Notice of Apparent Liability issued to Valley Mobile Communications, Inc., a licensee of two Public Land Mobile Stations in the 152 MHz band. Accordingly, this citation is presumed to be in error.

^{7/} R&O at ¶98.

successfully processed its backlog of 931 MHz applications in an orderly manner. In the weeks since it released the R&O, for example, the Commission granted roughly 360 931 MHz applications -- hardly proof of confusing and uncertain procedures causing processing difficulties. By failing to reconcile empirical fact with its rhetorical justification for fundamentally changing 931 MHz processing the Commission "crosses the line from 'the tolerably terse to the intolerably mute.'"^{2/}

Conclusion

Implementation of new 931 MHz application processing procedures retroactively on pending 931 MHz applications will preclude the efficient assignment of new licenses. Thus, Petitioners respectfully request that the Commission reconsider and rescind this revised policy.

Respectfully submitted,

PALOUSE PAGING, INC.
SAWTOOTH PAGING, INC.

By: 

Louis Gurman
Andrea S. Miano

Gurman, Kurtis, Blask & Freedman,
Chartered
1400 16th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 328-8200

December 19, 1994

Their Attorneys

^{2/} Action for Children's Television, 821 F.2d at 746, citing Greater Boston Television Corp., 444 F.2d at 851-52.